(1) (3)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

SECOND APPEAL NO. 28 OF 2006

APPELLANTS:
[Plaintiffs]

1. Mohanlal, aged about 57 years, son of Shri Lakshmandas Ji Chhadija.
2. Manoharlal, aged about 52 years, son of Shri Lakshmandas Ji Chhadija.

Both residents of Gyan General Stores, Novelty Market, Banjari Chowk, Raipur.

RESPONDENTS:
[Defendants]

1. Girish, aged about 47 years, son of Shri Romnath, Clerk, Nagar Palik Nigam Office, Raipur.
2. Hari, aged about 45 years, son of Shri Romnath, Fire brigade Office, Raipur.
3. Manohar, aged about 40 years, son of Shri Romnath.
4. Manoharlal, aged about 40 years, son of Shri Kishanchand.
5. Smt. Ganeshibai, aged about 65 years, widow of Late Moolchand Ji.

No.3 to 5 are residents of Navonath Mandir, Bhuipura, Raipur.

P.R. No. 153/06
Presented by Shri ... Advocate
dated 18/1/06

SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, 1908

(21)

HIGH COURT OF CHHATTISGARH, BILASPUR

SECOND APPEAL NO.28/2006

Mohan Lal and another

Vs.

Girish and 4 others

ORDER

Post for 12.07.2006

Sd/-
Sunil Kumar Sinha
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

SECOND APPEAL NO.28/2006

Mohanlal and another

Vs.

Girish and 4 others

Appearance :

Shri B.P. Sharma, counsel for the appellants.

ORDER

(12.7.2006)

SUNIL KUMAR SINHA, J.

(1) This is the plaintiffs' second appeal, filed u/s 100 of the Code of Civil Procedure against the judgment and decree dated 21.10.2005 passed in Civil Appeal No.9-A/2005 by the District Judge, Raipur, arising out of the judgment and decree dated 28.3.2005 passed in Civil Suit No.133-A/2003 by the Ist Civil Judge, Class-I, Raipur (C.G). The plaintiffs lost in both the courts.

(2) The brief facts are that the plaintiffs filed a suit for vacant possession of the suit land after removal of the superstructure. They also prayed for damages in sum of Rs.1085/- calculated till the date of filing of the suit and further for future damages @ Rs.5/- per day from the date of institution of the suit till the date of delivery of the possession. The case of the plaintiffs is that the suit land bearing Bandobast No.259/476

area 3003 Sq.Ft. as shown in the plaint map was purchased by the plaintiffs through a registered sale deed dated 02.02.1974 from Leela Ram, Kaudomal and Govind Ram for a consideration of Rs.2500/-. The possession was also delivered to them. However, on or about 29.3.1980, the defendant no.1 & 2 and their father Somnath encroached upon 574 sq.ft., of the aforesaid land and some super-structure was raised upon it. The superstructure was given on rent to defendant nos. 4 & 5 by defendants no.1 to 3 who were illegally enjoining the possession thereof. The plaintiffs demanded vacant possession of this property. The defendants filed their written statement denying the contentions of the plaintiffs. It was pleaded by them that the said land was not the property of Leela Ram, Kaudomal and Govind Ram, therefore, they were not entitled to sell this property to the plaintiffs. They further pleaded that the map annexed with the plaint is not a correct map and the correct map has been annexed with the written statement. They specifically pleaded that the land of which they are holding possession was the land of joint ownership and possession of Somnath, Kedranath and Shyamlal which they had purchased through a sale deed dated 07.2.1950 and they are in possession of this land since last 40 years.

(3) The learned trial Court framed various issues in this case and after recording evidence of the parties dismissed the suit of the plaintiffs holding that the plaintiffs could not prove that the defendants had encroached upon 574 sq.ft. of the suit Khasra Numebr as is alleged by them. Against the aforesaid judgment and decree passed by the trial Court, the plaintiffs filed an appeal before the lower appellate Court and the lower appellate court

also dismissed their appeal confirming the judgment and decree passed by the trial Court.

(4) Learned counsel for the appellants submits that the courts below committed an error of law in discarding the commissioner's report on technical grounds.

(5) It appears that for determining the factum of encroachment, a Commissioner was appointed by the trial Court who submitted his report and proved it as Ex.P.12. He was examined as P.W.3. He stated that he had not conducted the demarcation on the basis of revenue records as he had not taken any revenue record with him. He had also stated that he had done the measurement on the basis of the map annexed with the sale deed produced by the plaintiffs. He had also stated that he had taken the fixed points on the basis of contents of the map of the sale deed (not the map of revenue department). Lastly, it appears that no field book was prepared by the Commissioner as it has not been filed along-with the report. On these grounds, the trial Court did not believe the Commissioner's report holding that a correct measurement was not done.

(6) In the facts and circumstances, there appears to be no perversity in the concurrent findings recorded by the two courts below that the plaintiffs could not establish that the defendants had encroached upon any portion of the suit land as is alleged by them.

(7) A perusal of section 100 C.P.C. makes it clear that the scope and exercise of jurisdiction by the High Court in the second appeal u/s 100 is limited to the substantial question of law framed at the time of admission of the appeal or additional substantial

questions of law framed at the later stage after recording reasons for the same. This makes it clear that the existence of substantial question of law is *sine qua non* for the exercise of jurisdiction under the amended provisions of section 100 CPC. (***Please see (2004) Vol. V SCC 762 - Thiagarajan and others -vs- Venugopala Swamy B.Koil and others***).

(8) As to which would constitute a substantial question of law, it has been observed by the Apex Court in case of ***Santosh Hazari -vs- Purushottam Tiwari (deceased) by L.Rs. (2001) 3 SCC 179*** *that* "a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

(9) I do not find any reason to interfere in the concurrent findings recorded by the two courts below. This appeal involves no substantial question of law and the same cannot be entertained. The appeal stands dismissed.

There shall be no order as to costs.

Sd/-
Sunil Kumar Sinha
Judge